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No. 99-697

In the

Supreme Court of the United States

CLAUDE LAMBERT and MICHELINE LAMBERT,
Petitioners,

v.

CITY AND COUNTY OF SAN FRANCISCO, a California Municipal Corporation, on Behalf of the SAN FRANCISCO DEPARTMENT OF CITY PLANNING; SAN FRANCISCO CITY ZONING ADMINISTRATOR; and BOARD OF PERMIT APPEALS,
Respondents.

On Petition for Writ of Certiorari to California Court of Appeal for the First Appellate District

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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Robert H. Freilich and Jason M. Divelbiss, *The Public Interest Is Vindicated: City of Monterey v. Del Monte Dunes*, 31 Urb. Law. 371 (1999) 8

Pursuant to Supreme Court Rule 15.6, Petitioners Claude and Micheline Lambert respectfully reply to the Opposition to Petition for Writ of Certiorari (Opp.) filed by Respondents City and County of San Francisco, *et al.*, (City) on November 24, 1999.

INTRODUCTION

> [W]here the character of governmental action, on its face, can reasonably be said to be a "predatory regulatory practice," then the Court should move forcefully to deter acts of governmental tyranny by vigorously enforcing the takings clause.[1]

This case involves an unsuccessful attempt at regulatory extortion by the City and County of San Francisco, carelessly disguised by a ritualistic invocation of the police power. The official findings of the City's Planning Department describe an attempt to exact a $600,000 payment from Claude and Micheline Lambert in exchange for a permit allowing them to rent out vacant rooms in the Cornell Hotel. California Court of Appeal Appellant's Appendix (AA) at 91. The same official findings show that when the Lamberts refused to pay, and their counteroffer was deemed "not adequate," their permit was denied. AA at 105. The City itself has cited the Lamberts' refusal to engage in further financial haggling as a justification for the permit denial. AA at 344-45. Yet now the City demands that this Court--like the court below--avert its eyes, ignore the record of attempted extortion, and defer to the City's post-hoc, boilerplate rationalizations for its permit denial.

However, as the Opposition Brief itself demonstrates, deference in this case would spell the end of this Court's landmark decision in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). If the heightened standard of review this

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[1] Bruce W. Burton, *Predatory Municipal Zoning Practices: Changing the Presumption of Constitutionality in the Wake of the "Takings Trilogy,"* 44 Ark. L. Rev. 65, 94-95 (1991) (citations omitted).

Court mandated in *Nollan* is to have any effect in deterring predatory regulatory exactions, it must be applied in situations such as the one at bar. Otherwise, meaningful review of unconstitutional exactions will be evaded by the simple expedient of demanding cash (or land) in advance, under threat of denial of discretionary land-use permits if the required payments are not made.

Under the decision below, by merely repositioning its exaction demand to precede the decision to grant or deny a discretionary development permit, the City can convert the heightened scrutiny required by *Nollan* into no scrutiny at all. The Opposition Brief invokes judicial deference in asking this Court to ignore both the record compiled in the administrative proceedings below and facts placed in evidence by the City itself at an earlier stage of this litigation. Yet if such extreme deference had been applied in *Nollan*, the unconstitutional exaction at issue in that case would unquestionably have been upheld. If the *Nollan* doctrine is to retain any vitality, it is essential for this Court to grant the Petition for Certiorari, reject the City's pleas for deference, and apply the heightened standard of review required by *Nollan*.

I

THE ONLY ISSUE PRESENTED BY THIS CASE IS WHETHER *NOLLAN'S* HEIGHTENED STANDARD OF REVIEW APPLIES TO A PERMIT DENIAL WHEN THE PERMITTING AGENCY HAS SOUGHT AND FAILED TO OBTAIN A SUBSTANTIAL FINANCIAL EXACTION IN EXCHANGE FOR THE PERMIT

A. There Is No Factual Dispute in This Case

The City seeks to avoid the issue presented in this case by pretending there is a factual dispute concerning the City's actions. Opp. at 2-3, 14-19. There is no such dispute. As was fully set forth in the Petition for Certiorari (Petition), the City

has deliberately sought to disguise its routine extortionary demands under the Hotel Conversion Ordinance (HCO) by involving multiple City agencies in the process of issuing permits to "convert" vacant rooms. *See* Petition at 4-5. It is clearly of no significance to property owners which department or officer of the City demands an extortionary payment in exchange for a discretionary permit (in this case the Department of Building Inspection), and which one denies the permit when the demand is not paid (in this case, the Planning Commission).

The record is clear that the various City agencies acted in close concert in this matter, with the extortionary demand made by the Department of Building Inspection actually recounted in detail in the Planning Department's statement of findings ultimately denying the Lamberts' permit! AA at 97-105. There is no basis in the City's Planning Code for applying different zoning classifications to different residential rooms in the same hotel, independent of the artificial distinctions drawn by the HCO. There is no basis for considering a $600,000 fee as "mitigation" for the issuance of conditional use permits, independent of the one-for-one replacement requirements of the HCO. To pretend that the actions of the city agencies implementing the provisions of the HCO were somehow independent and uncoordinated is simply subterfuge.

Most tellingly, the entire saga of the Lamberts' application, the City's demand for cash, the Lamberts' unsuccessful counteroffer, and the resulting denial of the permit is set forth in a single document: the Planning Commission's official findings relating to the disapproval of the Lamberts' permit. AA at 97-105. This document also establishes that permits identical to those the Lamberts sought are routinely granted in exchange for cash. AA at 102.

As Presiding Justice Strankman noted in his dissent below, the Planning Commission's findings by themselves are sufficient to document the concerted effort by the City's various departments to exact a $600,000 payment from the Lamberts in

exchange for discretionary development permits and to establish that the permits were denied because the cash was not forthcoming. Petition Appendix (App.) A-16-17 (Strankman, P.J., dissenting). The City's pretense that the actions of its constituent departments were somehow unrelated is just that--a pretense.

B. When a Discretionary Development Permit Is Denied Because a Landowner Refuses to Comply with an Unconstitutional Exaction, the Standard of Review Will Be Dispositive in Determining "What Happened"

The City's efforts to shroud its actions behind an interagency shell game inadvertently highlight the importance of the issue presented by this case, since whether a court allows itself to be taken in by such a subterfuge will depend entirely on the level of scrutiny that is brought to bear.

In his dissenting opinion below, Presiding Justice Strankman recognized that a heightened standard of review must be applied in cases such as the one at bar if this Court's *Nollan* decision is "to achieve [its] legal aim." App. A-20 (Strankman, P.J., dissenting).

> To believe otherwise is to believe a regulatory agency can evade the constitutional safeguard of heightened scrutiny by a shrewd repositioning of its exaction demands.

App. A-21. The City's Opposition Brief demonstrates the wisdom of Justice Strankman's analysis. The City's defense consists of little more than thinly disguising its extortionary demands with an interagency shell game, Opp. at 14-19, and then insisting that this Court (and all courts) must adopt a policy of extreme deference in reviewing the City's actions. Opp. at 19-26. If this level of deference had been applied to the beach access exaction in *Nollan*, that demand would unquestionably have been upheld. The only significant difference between the

Nollan exaction and the $600,000 payment demanded of the Lamberts was one of timing. Under the argument now advanced by the City, if the California Coastal Commission had demanded that the Nollans sign over an easement before the Commission decided the fate of their permit application, that exaction would have completely evaded judicial review. Either the easement would have been dedicated to the state (and the Nollans would have been forced to waive their right to challenge it, as the City requires of owners who pay the HCO fee); or the permit would have been denied on boilerplate grounds such as those recited by the City in the present case. Either way, an exaction rightfully requiring heightened scrutiny would evade meaningful judicial review--unless this Court agrees that *Nollan* must be applied to "repositioned" exactions such as the one in the case at bar.

This point is driven home by the City when it argues that denying the Lamberts' permit could not have been motivated solely by the City's interest in increasing its revenues, since the denial "would insure that the City received no revenue." Opp. at 19 n.10. Of course, this overlooks the cautionary effect the denial of the Lamberts' permit was expected to have on the owners of the other 527 properties singled out for extortion by the HCO. As the Planning Commission pointedly spelled out in its findings, owners who pay what the City demands get their permits (AA at 102)--and those who don't, don't. AA at 105.

If the City succeeds in the transparent subterfuge documented by the record below, the protections established by this Court in *Nollan* will be nullified by little more than a snicker and a wink. Productive, law-abiding citizens like Claude and Micheline Lambert deserve better of their government and their courts.

II

THE SHARP DISAGREEMENT BETWEEN CALIFORNIA'S STATE AND FEDERAL COURTS ON *NOLLAN'S* APPLICABILITY TO EXTORTIONARY PERMIT DENIALS WAS NOT RESOLVED BY *CITY OF MONTEREY*

In *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422 (9th Cir. 1996), *cert. granted*, 118 S. Ct. 1359 (1998), the Ninth Circuit Court of Appeals upheld a finding of a regulatory taking based in part on a determination that the denial of a discretionary land use permit did not substantially advance legitimate state interests, as required by *Nollan*. *Id.* at 1428. A comparison of this holding to the decision below demonstrates the stark contrast between California's state and federal courts on this important question of federal constitutional law. In its Opposition Brief, the City asserts that this conflict was resolved by this Court's opinion in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 119 S. Ct. 1624 (1999), which supposedly "overruled the Ninth Circuit's decision in *Del Monte Dunes*," Opp. at 20, and "declined to apply the heightened standard of review to a permit denial." Opp. at 19. The City mischaracterizes the majority opinion in *City of Monterey* and now seeks to convince this Court that that opinion stands for precisely the opposite of what it actually says. Far from resolving the conflict between the California courts and the Ninth Circuit on *Nollan*'s applicability to extortionary permit denials, *City of Monterey* created a further conflict--the conflict between the holding of the court below and this Court!

As was fully set forth in the Petition for Certiorari, this Court in *City of Monterey* unequivocally affirmed the application of *Nollan's* heightened standard of review in the context of the denial of a development permit. 119 S. Ct. at 1636; *see* Petition at 25-26. Nevertheless, throughout its Opposition Brief the City persistently mischaracterizes *City of Monterey* as having reached

the opposite conclusion: "In [*City of Monterey*], this Court explicitly declined to extend the heightened standard of review from *Nollan* . . . to the denial of a permit," Opp. at 2; "[in *City of Monterey*], this Court declined to apply the heightened standard of review to a permit denial," Opp. at 19; "[in *City of Monterey*], this Court stated explicitly that the *Nollan* . . . heightened standard of review does not apply to denials of permits," Opp. at 20, etc. In short, the City has stood the *City of Monterey* opinion on its head, and now repeats it back to this Court for the very opposite of what the majority opinion actually held. Based on a decision holding that applying *Nollan's* "substantial advancement" standard to the denial of a development permit is "consistent with our previous general discussions of regulatory takings liability," 119 S. Ct. at 1636, the City implausibly argues that this Court rejected the applicability of *Nollan* in the context of permit denials!

Like its subterfuge concerning the record below, the City's misrepresentations concerning *City of Monterey* are easily exposed. The City has intentionally conflated two very different doctrines--the elevated "substantial advancement" standard of review from *Nollan* and the "rough proportionality" test from *Dolan v. City of Tigard*, 512 U.S. 374 (1994). By pretending that these distinct doctrines are identical, the City is able to misconstrue this Court's statements concerning *Dolan's* rough proportionality standard (*see City of Monterey*, 119 S. Ct. at 1635) as a rejection of *Nollan's* heightened scrutiny.

Ultimately, when forced to acknowledge that *Nollan* and *Dolan* enunciate two separate standards, the City's argument lapses into incoherence:

> *Dolan* . . . is founded on the *Nollan* opinion. These two opinions, applied together, define the law of regulatory takings in the case of legal challenges to cases requiring dedications of property.

Opp. at 22 n.13. This feigned inability to distinguish between two distinct legal standards laid down in two different opinions decided seven years apart may seem inconsequential. After all, there is no likelihood that this Court will be misled concerning its own pronouncements on regulatory takings standards. Unfortunately, however, the City is not alone in its studied misinterpretation of *City of Monterey*. The pretense that this decision somehow repudiated *Nollan's* heightened scrutiny in regulatory takings cases of all kinds has become a rallying cry of the regulatory defense bar throughout the United States. The resulting distortion of this Court's regulatory takings doctrine, as set forth in the following section, has created needless but widespread confusion concerning the proper applicability of the "substantial advancement" standard.

III

THE CITY'S MISREPRESENTATION OF THIS COURT'S RULING IN *CITY OF MONTEREY* IS PART OF A DISTURBING TREND TO DISTORT AND UNDERMINE THIS COURT'S REGULATORY TAKINGS JURISPRUDENCE THAT CALLS FOR FURTHER GUIDANCE FROM THIS COURT

In a recent article, one of the leading advocates of stringent governmental control over private property offered the same misinterpretation of *City of Monterey* to a national audience. *See* Robert H. Freilich and Jason M. Divelbiss, *The Public Interest Is Vindicated: City of Monterey v. Del Monte Dunes*, 31 Urb. Law. 371 (1999). Following the same moves as the City in its Opposition Brief, Prof. Freilich conflates *Nollan's* heightened standard of review and *Dolan's* rough proportionality standard into a nonexistent "*Nollan/Dolan*" standard, *id.* at 380. Then, because this Court rejected the applicability of *Dolan* to permit denials, Freilich is able to claim that *City of Monterey* establishes that *Nollan's* "intermediate standard of heightened scrutiny" is limited to "the narrow categorical exceptions of title or exaction takings." *Id.* at 380.

Ostensibly writing independently, a second pro-regulatory spokesman has recently advanced the same distorted reading of *City of Monterey*. Writing in the November, 1999, issue of the Environmental Law Reporter, regulatory advocate John D. Echeverria purports to find a rejection of *Nollan* via the following analysis:

> [*Del Monte Dunes'*] reading of *Dolan* also implicitly limits the scope of *Nollan*. In *Del Monte Dunes* the Court expressly discussed only the scope of the *Dolan* "rough proportionality" test. Thus, *Del Monte Dunes* could conceivably be read as not affecting the scope of the *Nollan* "nexus" test, as well as the heightened standard of review adopted in that decision. But if the "rough proportionality" test cannot logically be extended beyond the type of physical exactions at issue in *Dolan*, the same reasoning apparently requires that *Nollan*, which involved a physical occupation as well, be limited to the same extent. Thus, *Del Monte Dunes* appears to limit the scope of *Nollan* as well as *Dolan*.

John D. Echeverria, *Revving the Engines in Neutral: City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 29 Envtl. L. Rep. 10682, 10692 (Nov. 1999).

Thus, the fact that this Court's *City of Monterey* opinion expressly upheld the application of *Nollan's* heightened scrutiny by the trial court is simply swept aside by governmental advocates intent on undermining this Court's protections of individual rights under the Fifth Amendment. This concerted effort by pro-regulatory writers and practitioners has created widespread doubt and misunderstanding as to the current role of *Nollan's* heightened scrutiny requirement in this Court's takings jurisprudence. Leaving aside the source of the confusion, it is unfortunately true that both property owners and local governments must now ask: "How . . . are the lower federal and state courts to resolve takings claims based on a means-ends

theory until the [Supreme] Court finally provides more definitive guidance?" John D. Echeverria, *Revving the Engines in Neutral*, 29 Envtl. L. Rep. at 10692. The present case provides an ideal vehicle for this Court to provide much-needed elaboration. Further delay will only bring further confusion into the interpretation and application of the "substantial advancement" standard by state and federal courts throughout the Nation.[2]

CONCLUSION

For all the above reasons, and for the reasons stated in the Petition, the Petition for a Writ of Certiorari should be GRANTED.

DATED: December, 1999.

Respectfully submitted,

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[2] As this Reply was being drafted, the New York Court of Appeals handed down a decision incorporating the misinterpretation of *City of Monterey* urged by the authors quoted above. In *Bonnie Briar Syndicate, Inc. v. Town of Mamaroneck*, 1999 WL 1061494 (N.Y.), 1999 N.Y. Slip Op. 09833, New York's highest state court incorrectly held that *City of Monterey* rejected *Nollan's* heightened scrutiny requirement. *Id.* Thus, the state courts of New York and California stand in direct conflict with the Ninth Circuit and with this Court on this essential constitutional issue.